

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK J. SCHWARZENBERG

Claimant

VS.

STANDARD LIQUOR CORPORATION

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. 1,026,805

ORDER

Respondent and its insurance carrier requested review of the February 10, 2006, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The claimant injured his back in November 2004, while lifting a ramp on the back of his truck. Respondent referred claimant for medical treatment. He was diagnosed with a lumbar strain and received medications and physical therapy. Claimant was released from treatment with no restrictions on November 29, 2004. But as he continued working his back pain returned and worsened. When he sought further treatment in October 2005, the treating doctor apparently concluded claimant's problems were not work-related.¹

A preliminary hearing was scheduled and the issue was whether claimant's current need for medical treatment was caused by his work. The Administrative Law Judge (ALJ) determined claimant injured his back at work in November 2004 and then suffered a further series of repetitive injuries arising out of and in the course of his employment with respondent each and every working day through December 27, 2005.

¹ At the preliminary hearing the respondent requested additional time to submit the treating physician's medical records. The additional records filed with the Division on February 9, 2005, are limited to Dr. Benjamin R. Norman's November 2004 treatment records for claimant.

The respondent requests review of the ALJ's order arguing: (1) claimant's injury did not arise out of and in the course of his employment with respondent; (2) claimant's need for medical treatment is not related to his original injury; and, (3) the ALJ exceeded his jurisdiction in awarding temporary total disability benefits because claimant was working part-time as a realtor at the time of the preliminary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a delivery driver. He delivered cases of liquor, wine and beer which required driving, lifting, walking up and down ramps, and bending. He testified that his truck was loaded when he got it, and then he would drive to different liquor stores and unload the truck.

In November 2004, claimant hurt his back when he lifted a ramp in the back of his truck. He was put on part-time work, and respondent sent him to Dr. Benjamin R. Norman. Dr. Norman treated him for about a month and sent him to physical therapy. On November 29, 2004, Dr. Norman released claimant from further treatment and he continued working with no restrictions. Nevertheless, claimant's back continued to bother him off and on after the November 2004 accident.

Claimant's back started hurting him worse and in October 2005, he again talked to respondent about his problems and was told he would have to return to Dr. Norman or use the \$500 unauthorized medical. Claimant went to see Dr. Norman, and according to claimant, Dr. Norman told him his current problems were not work-related and refused to treat him.

Claimant noted that in the fall season his work load increased and he was having pain in his back at his belt line into his low back. He also had pain in his hip and both upper thighs. At that point, claimant went to see his personal physician, Dr. Jeffrey S. Reiswig. In a response on a Medical Statement form, Dr. Reiswig answered "Yes, this started last year (11-04) at work" to a question whether claimant's condition was caused or aggravated by his work.²

Dr. Reiswig gave claimant restrictions of no lifting more than 30 pounds, not repetitively, and no excessive bending or lifting. Dr. Reiswig scheduled claimant for an MRI and then referred him to Dr. B. Theo Mellion. Dr. Mellion reviewed the MRI results, which showed advanced degenerative changes at L3-4, L4-5 and L5-S1 with disk degeneration, central disk protrusions at each level, and left paracentral disk herniation at L5-S1.

² P.H. Trans., Cl. Ex. 1.

Dr. Mellion prescribed physical therapy and back rehabilitation, which was turned down by claimant's personal health insurance because it was considered work-related.

Claimant worked with Dr. Reiswig's restrictions through the 2005 holiday season, but claimant said his back continued to worsen during this time. Sometime in January 2006, respondent quit working him.

Claimant testified that in late December 2005 or early January 2006, he obtained his realtor's license. He currently works about 10 to 15 hours per week with Executive Realty. He had originally intended to work part time as a realtor while he worked for respondent.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

An accidental injury is compensable where the accident arose out of and in the course of employment.⁵ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.⁶

Respondent argues the claimant's current symptoms and need for medical treatment are not related to his November 2004 accident because of the approximate year time lapse between claimant's release from initial medical treatment and his request for additional treatment for his back. This argument overlooks the fact that as claimant continued working his regular job without restrictions his back condition worsened, especially as his workload became heavier with the onset of the fall holiday seasons.

Although the claimant alleged a specific injury date, he further alleged a series of repetitive mini-traumas each and every day worked thereafter. The claimant further described the worsening of his back pain which occurred as his regular job workload increased with the fall holiday season and finally resulted in his request for additional medical treatment. The claimant's testimony alone is sufficient evidence of the claimant's

³ K.S.A. 2005 Supp. 44-501(a).

⁴ K.S.A. 2005 Supp. 44-508(g).

⁵ K.S.A. 2005 Supp. 44-501(a).

⁶ *Harris v. Bethany Medical Center*, 21 Kan. App.2d 804, 909 P.2d 657 (1995).

physical condition.⁷ Moreover, the admittedly cryptic response from Dr. Reiswig indicated claimant's back condition was caused or aggravated by his work.

Based upon the record compiled to date, the claimant has met his burden of proof to establish that he suffered a work-related accidental injury to his back in November 2004 and then suffered additional repetitive injury to his back as he continued performing his work through December 2005. The Board agrees and, accordingly, affirms the ALJ's finding.

Respondent next argues the ALJ erred in awarding claimant temporary total disability compensation because claimant testified he was working part-time as a realtor.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁸ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁹

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.¹⁰

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Thus, the ALJ did not exceed his jurisdiction and the Board does

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P. 3d 1184 (2000), *rev. denied* 270 Kan.898 (2001).

⁸ K.S.A. 44-551(Furse 2000).

⁹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

¹⁰ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

not have jurisdiction to review the Judge's preliminary findings regarding temporary total disability compensation. Accordingly, respondent and carrier's appeal of this issue is dismissed.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated February 10, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2006.

BOARD MEMBER

c: Thomas Hammond, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director